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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE BOEING COMPANY, Plaintiff, vs MAZIAR MOVASSAGHI, in his official capacity as the Acting Director of the California Department of Toxic Substances Control, Defendant.	Case No. 2:09-cv-03165-GEB-GGH DEFENDANT'S RESPONSE TO ORDER TO SHOW CAUSE RE TRANSFER OF VENUE Hearing Date: June 21, 2010 Hearing Time: 9 a.m. Courtroom of the Honorable Garland E. Burrell, Jr., United States District Judge

Defendant MAZIAR MOVASSAGHI, in his official capacity as Acting Director of the California Department of Toxic Substances Control ("Defendant"), submits this response to the Court's May 25, 2010 Order to Show Cause re transfer of venue to the Central District of California. Defendant interprets the Order to Show Cause as the Court's belief that, pursuant to 28 U.S.C. § 1404(a), the United States District Court for the Central District of California is a more appropriate venue for this action. If the Court is indeed proposing that venue be transferred to the Central District of California, the Defendant concurs that this is an appropriate exercise of the Court's discretion.

Section 1404(a) of Title 28, United States Code, provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Along with the plaintiff's choice of forum, this Circuit has interpreted the provisions of Section 1404(a) to include various other considerations:

> *ease of access to the evidence*; the familiarity of each forum with the applicable law; *the nexus between the forum and the causes of action*; the feasibility of consolidating other claims; *any local interest in the controversy*; the relative court congestion and time to trial in each forum; the location where the relevant agreements were negotiated and executed; *the parties' contacts with the forums*; and difference in the costs of ligitation between the two forums; and the availability of compulsory process to compel attendance of unwilling non-party witnesses. [Emphasis supplied.]

Meijer, Inc. v. Abbott Laboratories, 544 F.Supp.2d 995, 999 (N. D. Cal. 2008) [citing *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986), and *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000)].

In considering the appropriateness of a transfer of venue, "[n]o single factor is dispositive, and a district court has broad discretion" to determine the most convenient location for trial of a matter "on a case-by-case basis." *Meijer*, *supra*, 544 F.Supp.2d at 999 [citing *Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)]. Obviously, the Eastern District of California was chosen by the Plaintiff. Several other considerations, however, support transfer to the Central District. In fact, although Plaintiff selected the Eastern District, there are no allegations in its Amended Complaint even suggesting that Sacramento is a primary corporate location for the Boeing Company. Indeed, Southern California – Huntington Beach and El Segundo, as well as the Santa Susana Field Laboratory itself – rather than Sacramento, are all

major corporate sites for Boeing. Moreover, Plaintiff's submissions to the Court have all been generated by the Washington, D.C. office of the Wilmer Cutler Pickering Hale and Dorr firm. It is far easier to make travel arrangements from Washington D.C. to the Central District (*i.e.*, Los Angeles) than it is to make such arrangements to and from Sacramento.

Nor does the *Defendant's* "business location" have any bearing on the question. The official with statewide administrative functions under a particular state law is typically, and as a matter of course, named as the proper party defendant in an action alleging that a state law is unconstitutional. *See Preskar v. United States*, 248 F.R.D. 576, 585 (E. D. Cal. 2008). Other than his status as a government official, however, Defendant Maziar Movassaghi, the Acting Director of the Department of Toxic Substances Control, is not alleged to have any role, and in fact had no participation, in the passage of the contested statute, SB 990. The California Legislature's "residence" in Sacramento would also be irrelevant to venue considerations because the concept of separation of powers precludes naming individual legislators, or the Legislature itself, in an action challenging the constitutionality of a state statute. *Id.* The bottom line is that the State of California and its agencies have a presence throughout the entire State, and does not "reside in any one particular venue more than another.

Several of the other factors that this Circuit considers as appropriate in a venue inquiry strongly support transfer to the Central District. The Santa Susana Field Laboratory is located within the Central District, in Simi Valley, on the border of Los Angeles and Ventura Counties. Document repositories, witnesses and the contaminated property itself – all critical to a resolution of this case – are located in the Central District.[1] In its opposition to Plaintiff's summary judgment motion, Defendant has raised disputed issues of material fact relating to the

[1] For example, Plaintiff's primary declarant, Philip D. Rutherford, who executed two lengthy factually-laden declarations, stated that he has managed and overseen environmental cleanup at the Santa Susana Field Laboratory for 20 years. Declaration of Philip D. Rutherford In Support of Plaintiff The Boeing Company's Motion for Summary Judgment, ¶5.

activities that took place at the Boeing (former North American Aviation) site beginning in the 1950s. Whether certain activities and buildings involving or containing radionuclides were used by North American and its successors *in their private capacity*, or as a contractor for the Department of Energy, will have an important bearing on the outcome of this matter. Therefore, production of documentary and testimonial evidence at depositions and trial will be far more convenient if venue is transferred to the Central District.

A major consideration noted by this Circuit is "local interest in the controversy." One sure way to gauge public interest in a particular controversy is by perusing the news media in each of the competing venues. Internet searches of two of the Southern California newspapers that have been covering the Santa Susana Field Laboratory contamination and the controversy over SB 990 – the Ventura County Star and the Los Angeles Daily News – yield numerous articles just in the last two years. A search of the Sacramento Bee did not produce a single news article in that same time period.[2] Clearly, the interest of the residents in Simi Valley in the outcome of this litigation and the cleanup of a site that poses a threat of radiation and chemical contamination to these residents strongly supports this case being heard in the Central District rather than the Eastern District.

In *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 561 F.Supp. 1238 (D.D.C. 1983), a non-profit organization for historic preservation brought suit in the District Court for the District of Columbia against the defendants for an order enjoining the planning and construction of two highways in Fort Worth, Texas, in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*. The defendants sought transfer under Section 1404(a) to the Northern District of Texas, where Fort Worth is located. With respect to the "local interest" factor, the district court in *Citizen Advocates* stated:

[2] A declaration supporting this assertion will be submitted on or prior to June 14, the date the parties' reply briefs are due.

> However, [Plaintiff's] reliance on the status of approximately 900 of their members as residents of the Fort Worth area who would be adversely effected [*sic*] by the actions challenged here, demonstrates that this organization too is closely connected to that forum [Northern District of Texas]. Furthermore, the controversy here is over the building of highways in Fort Worth, a subject obviously connected to that forum, not this one.

Citizen Advocates, 561 F.Supp. at 1239-40. The presence of this "local interest" factor "substantially diminished" the burden of showing that transfer to the Northern District of Texas was appropriate. *Id.*; *see*, *also*, *Sierra Club v. Van Antwerp*, 523 F.Supp.2d 5, 12, n.4 [citing *Citizen Advocates*, where the court noted that it "could easily conceive of a set of circumstances where relevant factors would weigh against deferring to plaintiffs' selected venue despite one plaintiff's residency in that district"].

Although, in the case at bar, Defendant was not the *moving party* for a transfer of venue, the "local interest" factor argues strongly for the Court to order a change of venue to the Central District. This case involves the Santa Susana Field Laboratory, a site contaminated with chemical and radioactive waste. That property is located in the Central District, as are the residents who are most impacted by what cleanup actions are undertaken at the site. Documents and witnesses will be more accessible in the Central District. Plaintiff has not alleged any "presence" in the Eastern District, and, on the contrary, has major offices in the Central District. Defendant, the head of the state agency charged with cleanup of the site, is, in a figurative sense, "present" throughout the State.

In conclusion, Defendant contends that there are numerous factors supporting the Court's

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Order to Show Cause, and that the provisions of Section 1404(a) are amply satisfied and fully support the Court's exercise of its discretion to transfer venue to the Central District of California.

Respectfully submitted,

Dated: June 7, 2010

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